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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 858

LOCAL NO. 149 OF THE AMERICAN FEDERATION OF TECHNICAL ENGINEERS, AFL-CIO,

PETITIONER,

v.

GENERAL ELECTRIC COMPANY,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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GENERAL ELECTRIC COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on December 16, 1957.

OPINION BELOW

The Opinion of the District Court is reported in 157 F. Supp. 270 and is reprinted in the Record herein commencing R. 7. The Opinion of the Court of Appeals is reprinted in the Record herein commencing at R. 13, is reported at 250 F.2d 922, and is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1957 (R. 28).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether in suits under Section 301 of the Labor-Management Relations Act for specific performance of agreements to arbitrate, the federal courts, under applicable federal substantive law or policy in the labor-management field, are required to permit the arbitrator rather than the courts to determine a question of arbitrability in the first instance in cases where particular grievances or disputes have not been expressly or clearly removed from arbitration by the collective bargaining agreement.

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Sec. 185, provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any

such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT

This action is brought under Section 301 of the Labor-Management Relations Act, 1947, 29 U.S.C.A., Sec. 185, to compel arbitration pursuant to the term of a collective bargaining contract.

Petitioner is a local labor union and is the recognized collective bargaining representative of certain classes of Respondent's employees employed at Respondent's plants in Lynn and Everett, Massachusetts. Respondent is a New York corporation engaged in manufacturing various products at the above-mentioned plants (R. 2-3).

Petitioner and Respondent entered into a written collective bargaining agreement on November 1, 1955, for a term of five years, commencing on August 15, 1955 (R. 6). That agreement sets forth in Article VII thereof a schedule of job grades and wage rates (R. 6), but the job grades were merely listed by number, and the schedule thereof did not contain detailed job specifications for each grade. However, presumably the company had its own detailed job specifications for each of such grades (see Article VII, Section 4 of the Agreement (R. 6) and company's brief in the Court of Appeals, pp. 18-19), although such specifications were not expressly incorporataed in the collective agreement. In addition, the agreement further provided in Article XV, Sections 1 and 2 (R. 6) that:

"Sec. 1. Any *grievance* which involves the interpretation or application of this Agreement, and which remains unsettled *after having been fully processed pursuant to the provisions of Article XIV* shall be submitted to arbitration . . . " (Emphasis supplied.)

"Sec. 2. The award of an arbitrator so selected upon any grievance so submitted to him shall be final and binding upon all parties to this Agreement. The arbitrator shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement. In addition, it is specifically agreed that no arbitrator shall have the authority to establish a wage rate or job classification, or authority to enter an award pertaining to Article XIX . . ."

Petitioner on November 7, 1955, filed a grievance on behalf of four employees alleging that they had been incorrectly compensated, inasmuch as the duties performed by them required that they be included under and compensated at the wage rates established for Grade 13. The grievances were filed and processed in conformity with the contract, and when settlement was not reached, a request for arbitration was made pursuant to Article XV, Section 1 (R. 6). Respondent refused to submit either the question of arbitration of the grievance or the grievance thereunder to arbitration, its contention being that the grievance was not subject to arbitration (R. 8).

Petitioner filed suit in the United States District Court for the District of Massachusetts on July 30, 1956, seeking an order directing the Respondent to arbitrate the grievance. Following the Respondent's Motion to Dismiss, the District Court dismissed Petitioner's suit for specific performance on the ground that Petitioner, in substance was attempting to estab-

lish a wage rate or job classification, which subject, under Section 2 of Article XV, had specifically been taken out of the area of arbitration.

From such Order of the District Court the petitioner union appealed to the United States Court of Appeals for the First Circuit (R. 10). That court, after hearing arguments of counsel, affirmed the judgment of the District Court in written opinion (R. 13-15) 250 F.2d 922, Appendix "A" herein.

The Opinion of the Court of Appeals, in denying Petitioner the relief sought, rejected the reasoning of the District Court that under Article XV, Section 2, the arbitrator had no right to establish a wage rate or job clasification for the reason, as stated by the Court of Appeals below:

> "The Union may well be correct in saying that this language, properly interpreted, was limited to forbidding the arbitrator to establish new job grades or wage rates, but was not intended to prevent the arbitrator from applying the established job grades and wage rates to existing jobs."

The Court, however, affirmed the judgment of the District Court on the different and separate ground that since no written detailed job specifications for the various Grades had been incorporated into the collective agreement, there was "no language in the collective agreement to be interpreted and applied for the purpose of determining whether the duties performed by any particular employee entitled him to be classified in any particular grade"; thus there was nothing which the arbitrator could interpret and no language which the arbitrator could apply, so that there was no agreement to arbitrate anything which the court could specifically order to be enforced. In so holding, the court determined that before it could

undertake to decree specific performance of a contract for arbitration, it

> "must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term in the collective bargaining agreement. Hence, whether we look to the terms of the Arbitration Act, or whether we look exclusively to the terms of § 301(a), the issue of arbitrability under the collective bargaining agreement is inescapably an issue which the district court must determine for itself as a matter of interpretation of the terms of the arbitration article in the collective bargaining agreement."

REASONS FOR GRANTING THE WRIT

This case involves a question of vital import in the law applicable to the arbitrability of labor disputes under arbitration clauses in collective bargaining contracts as presently being developed in suits for specific performance of agreements to arbitrate under Section 301 of the Labor-Management Relations Act of 1947. That question is whether in the light of federal, as distinguished from state common law, policy in the field, should not the arbitrator, rather than the courts, undertake the determination of questions of arbitrability of particular grievances when the question of arbitrability is arguable and when arbitrability is not expressly or clearly excluded by the terms of the contract? This question has not been, but should be, determined by this Court if the role of arbitration, as a means of settling disputes in industries affecting commerce, is to be expanded rather than contracted. For many years in the past and under common law *(Cf. International Association of Machinists v. Cutler-Hammer, Inc.*, 297 N.Y. 519, 74 N.E. 2d 464 (1947)), the issue of whether the arbitrator or the courts are to initially

determine the question of arbitrability of particular grievances in situations where the agreement to arbitrate itself is not clear on the question has been a particularly vexatious one. See address by Professor Archibald Cox of Harvard Law School, entitled "Current Problems in The Law of Grievance Arbitration" made at the University of Cincinnati Conference on Labor Arbitration, November 14, 1957 (referred to by the court below (I.R. 19)*), where the entire subject is discussed at length. Since the determination of this Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, and *General Electric Co. v. U.E.*, 353 U.S. 547, the federal courts find themselves in the position of fashioning substantive federal law applicable to the enforcement of collective agreements to arbitrate in the areas covered by the Taft-Hartley Act. Under the weight of authority at common law the courts undertook for themselves the initial determination of arbitrability when the arbitration agreement itself, as the agreement in this case, was ambiguous on the subject, and this was done even though the agreement did not specifically exclude the particular grievance from arbitration. In so doing, the courts reasoned that in order to decree specific performance, a specific undertaking to arbitrate the particular grievance must be found in the four corners of the agreement to arbitrate, and if such a specific undertaking could not be found, the courts could not decree enforcement.

This approach has operated to limit rather than expand the scope of operation of arbitration agreements, and, even worse, to cause the courts to intrude on the merits in an effort to determine the "speciousness" of assertions that a particular grievance had been submitted to the arbitral process by the parties. If legal concepts applicable to the interpretation of

* To appear in 30 Rocky Mountain Law Review at 246

commercial agreements, or even the common law concept as set forth in *Cutler-Hammer, supra,* are to be strictly applied, as did the court below, then it will often happen that the disputes over many matters, which the whole course of conduct between the parties contemplated should not be withdrawn from arbitration, would be removed, with resulting disruptions to production if, as in the present case, strikes are permitted over such non-arbitrable disputes. On the other hand, if in doubtful cases the arbitrator is permitted the right of initial determination of arbitrability, his ability to take into account factors other than the bare and often indecisive language of the arbitration agreement itself would serve to promote and not obstruct the process of arbitration. For the arbitrator has open to him not only the precise language of the contract, but also the background and continuing relationship of the parties, the past history in making and applying the terms of the agreement, and past industrial practices in the plant in similar or related situations. The arbitrator's frame of reference in applying a collective bargaining agreement is fundamentally different from the position of a court considering an ordinary legal document. A collective bargaining agreement is not an ordinary legal document like a commercial contract. As stated in a yet unpublished article by the late Professor Harry Shulman of Yale, "The Role of Arbitration in the Collective Bargaining Process:"

> "It is not the 'typical' offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not an undertaking to produce a specific result; indeed, it rarely speaks of the ultimate product. It is not made by parties who seek each other out to make a bargain from scratch and then go his own way.

"The parties to a collective agreement start in a going enterprise with a store of amorphous mehods, attitudes, fears and problems. Though cast in an adversary position, both are dependent upon their common enterprise . . .

"They meet in their contract negotiations to fix the terms and conditions of their collaboration in the future. But the resulting collective agreement covers only a small part of their joint concern. It is based on a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to list in the agreement. It is similarly impractical, if not impossible, to anticipate and guard against all possible future contingencies . . ."

Because of the foregoing factors, it is submitted that the court below erred in its strict common law, "look-in-the-dictionary" approach to the arbitration clause in the present case, when there was open to it, under *Lincoln Mills, supra*, the approach which the body of "federal labor law" indicates was more in keeping with the current federal attitude on the question. The bare terms of a collective contract may well fall short, as found by the court below, of expressing understandings implicit in the particular collective bargaining relationship evolved by the parties over the years; it is impossible for the parties to spell out, with any degree of preciseness, all of the issues or disputes which they desire to include or not to include within the scope of arbitration. Should this practical difficulty operate to preclude the union from submitting what are sometimes very important disputes to arbitration, particularly where, as here, the failure to

submit to arbitration can result in strike action* and the consequent disruption of production which it is paramount purpose of the Taft-Hartley Act to prevent?

The arbitration clause in the present case is a typical one, calling for the arbitration of "any grievance which ivolves the interpretation or application of this Agreement." Taken on their face, these words would appear broad enough to cover any dispute involving the scope of the arbitration clause which is, itself, a provision of the agreement, or to cover the question of whether, in the "application" of the agreement, the work of particular individuals fall into the grade and wage scale set forth in the agreement. At the very least, it is clear that this typical arbitration clause covers without limitation *all* disputes concerning interpretation or application of the collective agreement. The words are not restricted to disputes which are meritorious or even to disputes which are "clearly" arbitrable.

The union petitioner in this case has not asked the court to which it applied for relief to determine the merits of its contention that incorporating a specific grade and wage scale into the contract implies a promise to fit the work of particular individuals equitably into the established structure. That is for the arbitrator to determine, based on many circumstances going beyond the four corners of the contract. Since there is nothing in the contract which expressly precludes the submission of this question to the arbitrator, or which even clearly implies that the question cannot be considered one involving either the application or

---

* The no-strike clause in the present case is applicable only in respect to disputes over grievances which can be resolved by arbitration; in respect to all other disputes the union is free to strike (see R. 6, Exhibit "A", p. 28).

the interpretation of the agreement, the policy more consistent with the present federal attitude would appear to be to permit the arbitrator to decide the issue of arbitration in the first instance rather than the court. For how can any court, at its remote distance from the controversy, determine with any positiveness whether the establishment of numerical job grades with an hourly rate for each was intended to reserve for the company a free hand in classifying jobs or, on the other hand, to incorporate classifications either recognized in plant practice or established in the company's own records, in which event a promise to correct errors in the existing classification and to keep jobs classified equitably could fairly be implied? It is submitted that it is the very purpose of the arbitration agreement to provide a means of settling this type of dispute by the broader and more liberal process of arbitration rather than by narrow concepts of contract law.

The policy of initial determination by the judiciary adopted by the court below inevitably leads to judicial intrusion into the merits—a policy widely condemned among experienced arbitrators and expressly rejected by the National Conference of Commissioners on Uniform State Laws in drafting a Uniform Arbitration Act. See Cox article, *supra*. Under the decision of this Court in *Lincoln Mills* and *General Electric, supra*, the federal courts are now required to fashion a body of substantive law derived from, among other factors, the policy of our national labor laws. In enacting Section 301, "Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common law rule" (*Lincoln Mills*, 353 U.S. at 456). Further,

> "Section 8 for the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward

> settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation or 'voluntary arbitration'." (*Lincoln Mills*, 353 U.S. at 457.)

Finally, the whole thrust of the Labor-Management Relations Act of 1947 is towards the peaceful settlement of labor disputes through the process of collective bargaining, to the ultimate end of preserving industrial peace and preventing interruptions to the flow of interstate commerce. With these considerations of federal policy in mind, it is submitted that the court below should have approached the question presented to it in a way which would save and not destroy the arbitration process, and should have permitted the arbitrator to determine the question of whether the grievance was one arbitrable under the contract, subject, however, to the right of the court to review such determination. Excessive judicial intervention can only restrict the growth of the arbitration process. As stated by the Third Circuit in *Donahue* v. *Susquehanna Collieries Co.*, 138 F.2d 3,

> "... We should not choke the arbitration process which has been given Congressional approval by the fetters of earlier judicial conceptions."

CONCLUSION

It is respectfully submitted that, for the reasons above stated, this Petition for A Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5201

LOCAL NO. 149 OF THE AMERICAN FEDERATION OF TECHNICAL ENGINEERS, AFL-CIO,
PLAINTIFF, APPELLANT,

v.

GENERAL ELECTRIC COMPANY,
DEFENDANT, APPELLE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Arthur J. Flamm, with whom *Robert M. Segal* was on brief, for appellant.

Warren F. Farr, with whom *Lane McGovern* and *Ropes, Gray, Best, Coolidge & Rugg* were on brief, for appellee.

OPINION OF THE COURT

December 16, 1957.

MAGRUDER, *Chief Judge*. We have been much perplexed by this case, involving § 301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156).

Appellant Union filed a petition under the United States Arbitration Act, as amended (43 Stat. 883, 61 Stat. 669, 68 Stat. 1233), and under § 301 of the Labor Management Relations Act (61 Stat. 156), seeking a decree of specific performance to compel the employer to perform an agreement to arbitrate, as provided in a collective bargaining agreement executed on November 1, 1955, to be operative for a term of five years, with an automatic renewal provision thereafter from year to year.

An understanding of the controversy here requires an examination of several articles of the collective bargaining agrement.

Article VII, entitled "Wage Rates," contains the following provisions:

". . .

2. Job classifications, job rates and step rates are as shown on Exhibit 'B'.

. . .

4. When an employee is hired or transferred through the Company Personnel Department and assigned to a job within the bargaining unit, he will be given a card showing his job classification, starting rate, job rate, and rate of progression, if any, applicable to the job for which he is hired or to which transferred. In addition, the employee's new supervisor will explain the general scope of his duties and responsibilities on the new job. Similarly, the employee will be given such information when re-assigned to another job within the bargaining unit.

5. (a) Rates paid will be on steps. Job rates will be designated by grade.

(b) The minimum starting rate for an inex-

perienced employee will be three steps below the Grade 9 job rate.

(c) Employees will progress on steps, from the starting rate to the Grade 9 job rate, as follows:

6 months after hiring—increase one step.

After each additional 6 months—increase one step.

(d) An employee who is receiving the Grade 9 job rate and is assigned to a Grade 11 job, or higher, will be given a one step increase at the end of 6 months dating from assignment to such Grade 11 or higher job.

(e) Any further increase in rate, up to the job rate for his job, shall be based solely on the employee's performance on the job.

(f) Subject to the foregoing provisions of this Section 5, the job rate shall be paid for normal performance.

EXHIBIT 'B'

Job Rates and Progressive Step Rates

Grade	8-15-55	9-15-56	9-15-57	9-15-58	9-15-59
14	$130.13	$134.03	$138.05	$142.85	$147.79
13	120.27	123.88	127.60	132.03	136.60
12	110.93	114.25	117.68	121.77	125.99
11	102.58	105.65	108.82	112.61	116.50
10	93.56	96.37	99.26	102.71	106.27
9	86.55	89.15	91.82	95.01	98.30
	79.78	82.17	84.63	87.58	90.61
	74.99	77.24	79.56	82.32	85.17
	70.92	73.04	75.23	77.85	80.54"

It will be observed that this so-called Exhibit "B" in Art. VII contains no detailed job specifications setting forth the types of duties falling into grades 14, 13, etc. There is no language in the collective bargaining agreement to be interpreted and applied for the purpose of determining whether the duties performed by a particular employee entitle him to be classified in any particular "grade," carrying with it a corresponding wage rate.

Article XIV, entitled "Grievance Procedure," established a conventional three-step procedure for adjustment of employee grievances between the Union and the Company, by which negotiation was to continue at progressively higher levels if an agreement was not reached.

Article XV, entitled "Arbitration," read in full as follows:

> "1. Any grievance which involves the interpretation or application of this Agreement, and which remains unsettled after having been fully processed pursuant to the provisions of Article XIV shall be submitted to arbitration upon request of either the Union or the Company provided such request is made within 90 days after the decision of the Company has been given to the Union pursuant to Article XIV. In each case, the arbitrator shall be selected and the arbitration proceeding conducted pursuant to procedures mutually satisfactory to the Company and the Union.
>
> 2. The award of an arbitrator so selected upon any grievance so submitted to him shall be final and binding upon all parties to this Agreement. The arbitrator shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement. In addition, it is specifically agreed that no arbitrator shall have the authority

to establish a wage rate or job classification, or authority to enter an award pertaining to Article XIX, and that no provision of this Agreement or other agreements between the parties shall be subject to arbitration pertaining in any way to the establishment, administration, interpretation or application of Insurance or Pension Plans in which employees covered by this Agreement are eligible to participate."

Article XXVI, entitled "Management Authority," contains provisions which might perhaps be deemed to have added little or nothing to what would otherwise be implied from the other terms of the collective bargaining agreement. The article is as follows:

"Subject only eq. to any express limitations provided in this Agreement or in any other written agreement between the Company and the Union, the Company retains the exclusive right to manage its business including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force and to conduct its operations in a safe and effective manner.

This Article does not modify or limit the rights of the parties or of the employees under any other provisions of this Agreement or under any other written agreement between the Company and the Union, nor will it operate to deprive employees of any wage or other benefits to which they have been or will become entitled by virtue of an existing or future written agreement between the Company and the Union. Neither will this Article be used to limit or modify the rights of the Union to process grievances pursuant to Article XIV."

The petition filed by the Union in the present case,

after numerous formal allegations, set forth the following:

> "On or about November 7, 1955, the Union filed grievances with the Company alleging that the jobs performed by employees, Paul Nolan, Fred Lang, Robert Tivey and Ashley Corporon were incorrectly graded. The Union alleged that under the grades established by the Company and set forth in Article VII of the contract, the duties performed by these employees came within Grade 13 and that the Company had not properly applied the contract in its payments to said employees."

The petition went on to allege that these grievances had been processed in accordance with the procedures set forth in Art. XIV of the contract; that after such grievance procedure had been exhausted without coming to any agreement, the Union on April 23, 1956, requested the Company to proceed with an arbitration pursuant to § 1 of Art. XV of the contract; that the Company on May 1, 1956, notified the Union that it would not submit said grievances to arbitration and had continually thereafter adhered to its refusal to arbitrate; that the Company's refusal to arbitrate, as aforesaid, "was and is a violation and breach of the collective bargaining agreement between the Union and the Company."

The prayer of the petition was that the Company "be specifically ordered to perform its agreement to arbitrate by submitting to arbitration the grievances involving Paul Nolan, Fred Lang, Robert Tivey and Ashley Corporon."

The district court, on December 3, 1956, after a hearing entered a judgment dismissing the petition for an order to compel arbitration.

In an accompanying memorandum the district court, referring to the provision in § 2 of Art. XV, said the following:

> "It seems to me that the condition in this Section, 'It is specifically agreed that no arbitrator shall have the authority to establish a wage rate or job classification . . .' places a distinct limitation upon the arbitrator that covers the situation in hand.
>
> Apparently the jobs performed by the employees in question were newly created jobs, and since the contract makes no provision for the Union to be heard on the question of such grading, it seems to me that the question of grading these positions is not open to arbitration.
>
> From the foregoing I conclude and rule that the petition for an order to compel arbitration must be and is dismissed."

On this appeal by the Union from the judgment dismissing its petition, we are constrained to affirm the judgment of the district court.

We are aware of a viewpoint urged in responsible quarters that the interests of effective labor arbitration would best be served by committing to the arbitrator in the first instance the question of arbitrability, that is, the question whether there is any issue to be arbitrated under the collective bargaining agreement. It is said that a collective bargaining contract is a very special type of document, in respect of interpretation, as to which an arbitrator has certain advantages over a court; that a collective bargaining agreement, though embracing a multitude of terms covering numerous employees working at various tasks, cannot be expected to have pin-pointed each of many problems to be dealt with in relations between the management and the

union; that the contract instead contains unexpressed assumptions that many procedures and practices will continue; that under the more simplified and speedy procedures of an arbitration, more evidence with regard to these unexpressed assumptions may be available, and an arbitrator may have the additional advantage of background knowledge derived from past experiences with the parties. Therefore it may be desirable in the first instance to have an arbitrator pass on the threshold question of arbitrability, instead of running the possible risk that a court, in the guise of ruling on this preliminary question of the jurisdiction of the arbitrator, may in effect make a ruling upon the merits of the asserted grievance. See Summers, "Judicial Review of Labor Arbitration or Alice Through the Looking Glass," 2 Buffalo L. Rev. 1 (1952); Cox, "Some Lawyers' Problems in Grievance Arbitration," 40 Minn. L. Rev. 41 (1955); Clifton, "Arbitration and Arbitrability," 3d Annual Conference on Labor N.Y.U. 187 (1950). See also *Greyhound Corp.* v. *Division 1384 of Amalgamated Association of Street, etc., Employees of America,* 44 Wash. 2d 808, 271 P.2d 689 (1954). See also an address by Professor Cox at the University of Cincinnati Conference on Labor Arbitration, November 14, 1957, entitled "Current Problems in the Law of Grievance Arbitration."

While not ignoring the force of these considerations, it seems to us that they would be persuasive not so much in a case like the present, but rather in inducing the parties to make a voluntary submission to arbitration, and in inducing the parties to include terms in a collective bargaining agreement giving wide scope to the questions to be submitted to arbitration.

But when one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the

court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise. The petitioning Union in the present case has indeed recognized this necessity, for the petition alleges that the refusal of the defendant Company to submit the stated grievance to arbitration constituted a breach of the Company's contract to arbitrate as contained in Art. XV of the collective bargaining agreement.

In our elaborate opinion in *Local 205, etc.* v. *General Electric Co.*, 233 F.2d 85, 101 (1956), we dealt with the foregoing matter as follows:

> "Arbitrability is a question which the district court must pas on in the first instance. By way of guidance, it may be appropriate to note here a brief comment on some general principles. The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation. . . . However, an arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable therein and whether applicant has satisfied the contract procedures prerequisite to arbitration. . . . Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter,

> the court must decide such points before it can give relief under §§ 3 or 4 of the Arbitration Act. If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§ 10-11 of the Act."

See to the same effect *Davenport* v. *Proctor & Gamble Mfg. Co.*, 241 F.2d 511 (C.A. 2d, 1957); *International Union, United Automobile Aircraft, etc.* v. *Benton Harbor Malleable Industries*, 242 F.2d 536 (C.A. 6th, 1957); "Matters arbitrable under arbitration provisions of collective labor contract," 24 ALR(2d) 752, 766 (1952).

What we said in *Local 205* v. *General Electric Co.*, supra, was stated on the asumption that the provisions of the United States Arbitration Act were applicable to an agreement to arbitrate contained in a collective bargaining agreement. If that assumption is correct, it is pretty clear from the provisions of § 3 and § 4 of the Arbitration Act (61 Stat. 670-71) that the trial court, as a preliminary to giving the relief therein set forth, must necessarily determine as a matter of law whether there has been any contract agreement to submit the issue in question to an arbitration.

It is true that § 301 of the Labor Management Relations Act of 1947 can no longer be challenged on the score of unconstitutionality. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957); *International Brotherhood, etc.* v. *W. L. Mead, Inc.*, 230 F.2d 576 (C.A. 1st, 1956). But despite the fact that the petitioning Union in the case at bar professed to base its petition on the United States Arbitration Act as well as on § 301 of the Labor Manage-

ment Relations Act of 1947, it may well be that we are not entitled to dispose of the present case by reliance upon any provision in the Arbitration Act. When *Local 205* v. *General Electric Co.* was before this court, we were troubled by "the hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements". (233 F.2d at 96.) We therefore thought we were not justified in reading into the very general language of § 301(a) authority in a federal court to decree specific performance of an agreement to arbitrate unless we could find that the provisions of the United States Arbitration Act, by proper interpretation, were made applicable by the Congress to agreements to arbitrate contained in collective bargaining agreements. We suggested the following "practical grounds" in support of this conclusion:

> "A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitrator, stop and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could overrule the common law bars to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration." (Ibid.)

And so, after a full consideration of the terms and legislative history of the United States Arbitration Act (233 F.2d at 97-101), we came to the conclusion that though the Congress, in enacting the Arbitration Act, undoubtedly was focusing its attention on the field of commercial arbitration, it nevertheless had chosen

to enact a statute which was broad enough in terms to apply to collective bargaining agreements.

Our opinion also stated:

> "The case will therefore be remanded for further proceedings under the Arbitration Act. Since our decision makes clear for the first time in this circuit that that Act is applicable, the district court should now permit the parties to amend their pleadings so as to allege, respectively, compliance with the requisites of the Act and defenses afforded by it." (233 F.2d at 101)

Since the district court has dismissed the union's complaint for a decree of specific performance on what we held to be a mistaken view that the Norris-LaGuardia Act forbid the district court to grant the requested decree, we entered a judgment in the case vacating the district court's judgment of dismissal and remanding the case to that court for further proceedings not inconsistent with our opinion.

Certiorari was granted in this and other cases. The main opinion of the Supreme Court was in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957). In that case, without mentioning the Arbitration Act, the Supreme Court concluded that the general language in § 301 of the Labor Management Relations Act of 1947 was in and of itself sufficient authority to a federal district court to decree specific performance of an agreement to arbitrate. Only a brief opinion was written by the Supreme Court in *General Electric Co.* v. *Local 205* (353 U.S. 547), which the Court regarded as a companion case to *Textile Workers of America* v. *Lincoln Mills of Alabama*. Referring to our opinion in 233 F.2d 85, the Supreme Court said:

> "It first held that the Norris-LaGuardia Act did not bar enforcement of the arbitration agreement.

It then held that while § 301(a) of the Labor Management Relations Act of 1947 gave the District Court jurisdiction of the cause, it supplied no body of substantive law to enforce an arbitration agreement governing grievances. But it found such a basis in the United States Arbitration Act, which it held applicable to these collective bargaining agreements. It accordingly reversed the District Court judgment and remanded the cause to that court for further proceedings.

We affirm that judgment and remand the cause to the District Court. We follow in part a different path than the Court of Appeals, though we reach the same result. As indicated in our opinion in No. 211, *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, supra, we think that § 301(a) furnishes a body of federal substantive law for the enforcement of collective bargaining agreements in industries in commerce or affecting commerce and that the Norris-LaGuardia Act does not bar the issuance of an injunction to enforce the obligation to arbitrate grievance disputes." (353 U.S. 547 at 548)

The Supreme Court sent down to us a certified copy of its judgment in the case, which judgment, under paragraph 3 of Rule 59, Revised Rules of the Supreme Court (346 U.S. 1009), served also as the Supreme Court's mandate to the district court. That judgment by the Supreme Court contained the following: "It is now here ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby affirmed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Massachusetts."

It may perhaps be surmised that if the Supreme

Court had agreed with our analysis as to the applicability of the Arbitration Act, it would have said so, for that conclusion would have rendered the case before the Supreme Court easier to decide. On the other hand, it is possible that the Supreme Court found the proper interpretation of the Arbitration Act a difficult question to decide, which it was justified in side-stepping as unnecessary to the disposition of the case, since, in its view, in any event the broad provisions of § 301(a) of the Labor Management Relations Act of 1947 were sufficient in and of themselves to authorize a federal district court to decree specific performance of an agreement to arbitrate.

The foregoing, of course, is pure speculation on our part. Perhaps it is a speculation in which we ought not to indulge, in the absence of an express ruling by the Supreme Court on the matter. Anyhow, though we are still convinced of the correctness of our ruling as to the applicability of the Arbitration Act, we think that in disposing of the present case we should, as an alternative ground, proceed on the assumption that the provisions of the Arbitration Act are by their terms inapplicable to collective bargaining agreements. We are unable to say whether, on that assumption, in fashioning the federal substantive law to be applied in suits under § 301(a), the Supreme Court would adopt, as a guiding analogy, the provisions of the United States Arbitration Act, as was done by Judge Wyzanski in *Textile Workers of America (CIO)* v. *American Thread Co.*, 113 F. Supp. 137 at 142 (D. Mass. 1953). However that may be, and focusing our attention exclusively on the language of § 301(a), it is obvious that the plaintiff, in a suit under § 301(a), has the burden of establishing that it is bringing suit for appropriate relief, legal or equitable, for violation of a term of a collective bargaining agreement; and that therefore the district court, before undertaking to

decree specific performance of a contract for arbitration, must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term in the collective bargaining agreement. Hence, whether we look to the terms of the Arbitration Act, or whether we look exclusively to the terms of § 301(a), the issue arbitrability under the collective bargaining agreement is inescapably an issue which the district court must determine for itself as a matter of interpretation of the terms of the arbitration article in the collective bargaining agreement.

We find nothing in the terms of the carefully guarded arbitration agreement here to warrant the conclusion that the employer has agreed to arbitrate the question of the arbitrability of the grievance stated in the petition. We doubt whether the district court should have rested its dismissal upon the provision of § 2 of Art. XV that "it is specifically agreed that no arbitrator shall have the authority to establish a wage rate or job classification". The Union may well be correct in saying that this language, properly interpreted, was limited to forbidding the arbitrator to establish new job grades or wage rates, but was not intended to prevent the arbitrator from applying the established job grades and wage rates to existing jobs.

More fundamentally, what is submitted to arbitration is defined in § 1 of Art. XV as "Any grievance which involves the interpretation or application of this Agreement". As we have previously pointed out in this opinion, there is no language in the collective bargaining agreement to be interpreted and applied for the purpose of determining whether the duties performed by any particular employee entitle him to be classified in any particular grade. The provisions of Art. VII of the present collective bargaining agreement may perhaps be contrasted with the provision of

the collective bargaining agreement found in *Local 205 v. General Electric Co.*, supra, which, in Art. IX, contained the following, absent in the present case: "The Company shall furnish the Union, within 30 days after the signing of this Agreement, a complete list of job classifications and rate ranges." Under such an agreement, it may perhaps be argued that once the Company has supplied the Union with a list, as aforesaid, the terms of the job classifications and rate ranges become incorporated in the collective bargaining agreement by reference, and become binding on the Company, so that a dispute regarding whether the duties performed by a particular employee fall within the job description of the particular grade relates to "the application or interpretation of any provisions of this Agreement", the type of grievance which the Company agreed to arbitrate in Art. XIII of that collective bargaining agreement. In the case at bar, the collective bargaining agreement contains absolutely no language by way of job descriptions which could be interpreted or applied for the purpose of determining whether the duties performed by a particular employee fall within any particular grade.

A judgment will be entered affirming the judgment of the District Court.

PROCEEDINGS IN COURT OF APPEALS.

On the same day, December 16, 1957, the following judgment was entered:

JUDGMENT

December 16, 1957.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration thereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
/s/ ROGER A. STINCHFIELD,
Clerk.

Thereafter, on January 2, 1958, mandate issued and the original papers were returned to the District Court.